

COMPLIANCE BOARD OPINION NO. 01-11

June 22, 2001

Ms. Jann Jackson, Executive Director
Mr. Matthew H. Joseph, Director of Public Policy
Advocates for Children and Youth

The Open Meetings Compliance Board has considered your complaint that the State Board of Education (“State Board”) may have violated the Open Meetings Act in connection with closed meetings involving reconstitution-eligible schools in Baltimore City. For the reasons explained below, we conclude that the State Board did not violate the Act in administering the school reconstitution program during the time period under review.

I

Complaint and Response

In your complaint on behalf of the Advocates for Children and Youth, you ask that we review whether the State Board has complied with the Open Meetings Act when it conducted meetings closed to the public during the past two years involving the reconstitution of underperforming schools. As part of your complaint, you incorporate a letter addressed to Dr. Philip Benzil, President of the State Board, from Ms. Jann Jackson, Executive Director of Advocates for Children and Youth, dated March 21, 2001. Among other matters, Ms. Jackson alleges two instances in which the State Board may have violated the Open Meetings Act: meetings last year involving a decision not to name any new reconstitution-eligible schools for a certain period, and meetings this year allowing the Baltimore City Public School System to “retain control over Westport Elementary/Middle,” a school considered for State reconstitution. Ms. Jackson views these decisions as adoption of new standards under the State Board’s reconstitution program that should have occurred in a public session.¹ You ask that we not limit our review to these two matters, however, but that we consider all of the State Board’s meetings that were closed to the public in connection with the reconstitution of schools over the two-year period.

¹ Ms. Jackson raises numerous other issues in connection with the school reconstitution program. Because our jurisdiction is limited to questions of compliance with the Open Meetings Act, we express no views on any other issue. *See* note 7 below.

In a timely response on behalf of the State Board, Ms. Valerie V. Cloutier, Assistant Attorney General and Principal Counsel to the State Department of Education, described the local and State reconstitution process as administered under the State Board's regulations. The response also set forth the manner in which reconstitution decisions were made during 2000 and 2001, including the contract for the operation of Westport. The State Board included with its response copies of the relevant regulations, meeting notices, minutes, and other related documents. The State Board's position is that the identification of schools for local or State reconstitution constitutes an executive function, outside the scope of the Open Meetings Act. *See* §10-503(a)(1)(i).² In the State Board's view, decisions concerning the moratorium and approval of a third-party contractor selected by the Baltimore City School System were "intertwined with the discussion on the identification of specific schools" for reconstitution consideration. In several instances, discussions concerning the reconstitution program occurred in closed sessions. These sessions involved issues such as requests for proposals for running schools under State reconstitution, conferring with legal counsel, and conferring with staff on litigation matters. These meetings, the State Board indicates, were appropriately closed in accordance with the procedural requirements of the Act.

In a reply to the State Board's answer, you suggested that acceptance of the State Board's position that it was engaged in an executive function would "open a huge loophole in the Open Meetings law: public bodies could effectively bypass legitimate public scrutiny ... by merely promulgating broad and vague 'permissive' regulations that provide no parameters for decision-making and instead allow the public body to conceal its real rules, standards and criteria." You elaborated on your concern regarding the administration of the State Board's regulations and suggested that the State Board can distinguish between discussions of standards affecting more than one school versus discussions involving the application of those standards to an individual school.

On receipt of your second letter, the Compliance Board offered the State Board an opportunity to respond. In a supplemental response on behalf of the State Board, Ms. Cloutier elaborated on the role of the State Board in carrying out its responsibilities under the State education law, citing specifically, §§2-205(g)(2) and 2-206(g) and (h) of the Education Article, Maryland Code, to illustrate the State Board's broad administrative responsibilities.³ Ms. Cloutier emphasized that when

² Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

³ Section 2-205(g)(2) provides that the State Board, through the State Superintendent, shall exercise general control and supervision over the public schools and educational interests of the State. Section 2-206(g) and (h) address the correction of
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the State Board determines each year whether any schools should be placed under local or State reconstitution, or whether no school should be placed under reconstitution, it is carrying out an executive function involving the administration of its regulations, not an act of policy formation.

II

Background – School Reconstitution Program

The General Assembly has granted the State Board of Education broad responsibility for determining elementary and secondary educational policies of the State and has charged the State Board with carrying out the relevant provisions of the State education law. *See* §2-205 of the Education Article. Furthermore, the State Board is required to implement a program of education accountability for the operation and management of public schools. *Id.*, §7-203. And, as noted above, in certain circumstances, the State Board may require a local school to end operations. *Id.* §2-206(h). The State Superintendent, in turn, is the Chief Executive, Secretary, and Treasurer of the State Board; although she may not vote, she may advise the State Board on any matter under consideration. *Id.*, §2-204(c). Among her duties is carrying out the educational policies of the State Board. *Id.*, §2-303(c)(1).

In 1993, the State Board adopted by regulation a system of performance-based accountability standards for the public schools, the current version of which is found at COMAR 13A.01.04.⁴ Pertinent for our purposes are COMAR 13A.01.04.07, authorizing the State Board to require a local school system to reconstitute the overall program and management of a school⁵ if the school fails to satisfy certain standards, and .08, requiring the State Board to determine the program and management reconstitution of a school if it rejects a local board of education's reconstitution proposal, transition plan, long-term reconstitution, or

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deficiencies in noncollegiate educational institutions and the State Board's authority to order a noncollegiate educational institution to end operations, respectively.

⁴ On April 6, 2001, the State Board published proposed regulations modifying the school reconstitution program. *See* 28:7 Md. Reg. 730-733. The State Board gave final approval to the proposed regulations without substantive changes on May 22, and the changes take effect June 25. However, references to the regulations throughout this opinion are to the regulations in place at the time of your complaint.

⁵ Reconstitution may involve changing a school's administration, staff, organization, or instructional program, or any combination of these factors. *See* COMAR 13A.01.04.02B(8).

annual plan update or if it approves the State Superintendent's recommendation for State reconstitution.

III

"Executive Function" Analysis

A. General Criteria

With exceptions not pertinent here, the Open Meetings Act does not apply to a public body, like the State Board, when it is carrying out an executive function. §10-503(a)(1)(i). As we have repeatedly explained, consideration of the executive function involves a two-step analysis.

The term "executive function" is defined in part by what it is not: a discussion that constitutes an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function is, by definition, not an executive function. It does not necessarily follow, however, that a discussion outside these alternative functions is perforce an executive function. The topic of discussion must still meet the central definition of an "executive function" – involving "the administration of ... a law of the State ... or ... rule, regulation, or bylaw of a public body." §10-502(d). *See, e.g.*, Compliance Board Opinion 94-7 (August 16, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 96, 97-98. And, as we have recently clarified, the action of the public body must be "administrative in character," rather than policy making, in order to qualify as an executive function. Compliance Board Opinion 01-7 (May 8, 2001), slip op. at 5. In other words, the second aspect of the analysis requires consideration of whether the matter involves the development of new policy, as contrasted with the application of a law or policy already in place. The executive function exclusion covers only the latter. Compliance Board Opinion 00-10 (October 18, 2000), slip op. at 3.

B. Identification of Schools for Reconstitution

The State Board has prescribed in its regulations the manner in which reconstitution decisions are made. The regulations describe the data that are considered and the standards by which the data are evaluated, COMAR 13A.01.04.03 and .04, as well as the data that the State Department of Education and local school systems must publish each December. COMAR 13A.01.04.05. When the standards are not satisfied, the regulations require adoption of a school improvement plan, COMAR 13A.01.04.06, and authorize the State Board to require local reconstitution under certain circumstances. COMAR 13A.01.04.07. The regulations spell out in considerable detail the manner in which local reconstitution process is to be implemented. *Id.* Finally, the regulations address the option of State

reconstitution under prescribed situations and the manner in which State reconstitution may be implemented. COMAR 13A.01.04.08.

In its response, the State Board describes in more detail how the regulatory process relating to reconstitution decisions is implemented. The practice has been for the State Superintendent to meet with the State Board each year in early January to evaluate whether any schools should be preliminarily identified for local reconstitution. Following meetings with the appropriate local school officials, schools named for reconstitution are announced at a public session of the State Board later that month. The State Board's position is that this process constitutes an executive function.

Considering the detailed regulations under which the State Board acts on this matter, we have little difficulty agreeing with the State Board's assessment that the naming of individuals schools for reconstitution under its regulations meets the definition of executive function under the Open Meetings Act. This activity, in which the State Board evaluates specific schools, clearly involves the implementation or application of an existing regulatory scheme. It does not involve the development of policy. Therefore, regardless of whether the State Board elects to make these decisions in a public or closed session, the Open Meetings Act simply does not apply. §10-503(a)(1)(i).⁶

C. Moratorium

While we readily conclude that the naming of schools for reconstitution constitutes an executive function, a closer question is presented by a meeting at which the State Superintendent recommended that the State Board impose a one-year moratorium on the naming of new schools for reconstitution. This closed meeting occurred on January 5, 2000.⁷

⁶ The Superintendent announces the schools that the State Board newly identified for local reconstitution during a public meeting of the State Board. Based on your complaint, our review is limited to actions taken at closed meetings of the Board. However, the Open Meetings Act is not applicable to executive functions, regardless of whether the applicable meeting is open or closed to the public. Furthermore, the practice of the State Board apparently has been to give the public notice, not only of public and closed meetings subject to the Open Meetings Act, but also of meetings involving executive functions as well.

⁷ The final decision on this matter occurred at a public meeting February 1, 2000, at which the State Board ratified a decision that had been made earlier through the polling of board members by telephone. The public meeting is not the subject of your complaint. Moreover, the survey of board members individually via a telephone poll is not a "meeting" under the Act. See §10-502(g).

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It may be argued that consideration of a moratorium was a policy decision and therefore could not qualify as an executive function under the Act. If the moratorium decision was, in fact, a “measure to set public policy” – hence, a legislative function – or if it went beyond administration of the existing regulatory scheme, it may not be deemed an executive function. Consequently, if consideration of the moratorium was not an executive function, the State Superintendent’s initial recommendation before the State Board would have been subject to the Act. In other words, when the State Superintendent indicated that this matter would be considered at a future time, she invited discussion about the issue. Even if no discussion in fact occurred, the raising of the topic was the beginning of the process by which the matter was considered. Therefore, if a policy matter was involved, the Open Meetings Act would have applied. *See* Compliance Board Opinion 00-10 (October 18, 2000), slip op. at 8. As the Court of Appeals has observed, “every step of the process ... constitutes the consideration or transaction of public business.” *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A. 2d 1070 (1980).

Unlike the process under which the State Board considers schools for reconstitution pursuant to its regulations, consideration of the moratorium constituted an exception to the norm, a decision to place reconstitution determinations on hold. In justifying her recommendation, the State Superintendent was not relying solely on provisions in the State Board’s regulations. Rather, other policy considerations were at involved.⁸ The moratorium may have been viewed as inconsistent with expectations from the public that the reconstitution process would continue to move forward.

On the other hand, the moratorium did not alter the existing regulatory program. It simply suspended adding additional schools for a specific time interval

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In its response, the State Board requests that we not address whether the State Board, in effect, adopted a new rule in connection with imposition of the moratorium and the contracting for the operation of Westport, an administrative law issue raised in Ms. Johnson’s letter to Dr. Benzil. As the State Board correctly points out, we have no authority to consider matters outside of the Open Meetings Act. However, we must consider the nature of these decisions in evaluating whether these matters constitute executive functions under the Act.

⁸ Reasons in support of the State Superintendent’s recommendation included the facts that the two school systems affected were both under supervision of the courts; there were judicial and legislative mandates for the development of master plans concerning management of the school systems and improvement of student achievement; there was oversight of both school systems by outside entities; and the State Department of Education was providing both school systems with increased levels of technical assistance. Memorandum to Members of the State Board from Dr. Nancy S. Grasmick, January 25-26, 2000.

in light of several factors pertaining to the school systems in question. As pointed out in its response, the State Board has discretion whether to name schools for local reconstitution under its regulatory scheme. COMAR 13A.01.04.07A. Therefore, there was no assurance that the State Board would automatically name eligible schools each year. Furthermore, as we have noted, the identifying of individual schools for reconstitution constitutes an executive function. The State Board's decision regarding a group of schools is simply the sum of its decisions whether to require reconstitution of particular schools. For example, in implementing the reconstitution program under its current regulatory scheme, the State Board could certainly limit the number of eligible schools at which it would require reconstitution in any given year to ten, or five, or any other number, based on factors impacting a school system – a decision that would clearly constitute an executive function. We cannot conclude that what would have been an executive function had the State Board named one school for reconstitution loses that character merely because the State Board declined to name any schools for reconstitution during a given year – which, in effect, is what the State Board did in imposing the one-year moratorium.

Although we acknowledge that the issue is a close one, on balance, we find the State Board's imposition of the moratorium involved application of an existing discretionary standard rather than adoption of new policy. Hence, it involved an executive function outside the scope of the Open Meetings Act.

D. Westport Elementary/Middle School

The State Board also contends that meetings with representatives of the Baltimore City School System concerning State reconstitution of Westport Elementary/Middle School involved executive functions outside the scope of the Open Meetings Act.

During a January 10, 2001, meeting of the State Board that was closed to the public, the State Superintendent of Schools informed the Board of a proposal received from the Chief Executive Officer of the Baltimore School System concerning City schools newly identified for reconstitution and schools within the City identified for State reconstitution. After being advised by its legal counsel that the State Board may allow a local school system to engage a third-party to operate a school under the State reconstitution program, the State Board agreed to consider the City school system's proposal and requested that the Chief Executive Officer attend the regular January meeting of the State Board.

At a January 30, 2001, meeting, the Chief Executive Officer and the President of the New Baltimore City Board of School Commissioners discussed their proposal concerning low performing schools as well as their request to contract with Victory Schools, Inc., for operation of a school under State reconstitution. Because the discussion concerned specific personnel and procurement matters involving legal

implications, representatives of the Baltimore City School System apparently asked the State Board to go into closed session. At the conclusion of the meeting, the State Board deferred action until its public session to following day. At the State Board's public session on January 31, 2001, the State Superintendent recommended that Baltimore City be authorized to develop a contract for the operation of Westport, subject to certain conditions; the State Board approved this recommendation.

On February 27, 2001, the State Board voted to go into closed session, at which time representatives of the Baltimore City School System, staff from the State Department of Education, and counsel to the State Board met with the Board to discuss the City School System's proposal involving Victory Schools, Inc. The State Board discussed this matter further at a closed meeting on March 27, 2001. It deferred its decision, however, until its public session. At that time, it approved the proposal subject to five conditions, which were satisfied by April 24, 2001.

Because all of these closed meetings dealt with the operation of one or more specific schools under the existing reconstitution program, we find that the discussions involved executive functions, outside the scope of the Open Meetings Act. *See* Part IIB above.⁹

IV

Meetings Subject to the Act

In addition to discussions involving specific schools, the State Board considered other matters involving the reconstitution program in closed session during the time period in question. Issues considered included the State Department of Education's request for proposals for the operation of schools under the State reconstitution program during the course of a two-phase procurement process and consultations with legal counsel involving the administration of schools under State reconstitution. In each instance, the State Board cited specific authority under § 10-508(a) of the Open Meetings Act. We have no evidence that the discussion during

⁹ The State Board also cited provisions of the Open Meetings Act as grounds for closing these meetings. However, because we agree that deliberations concerning the application of the reconstitution program to specific schools under the existing regulatory framework constitute an executive function, we need not address the application of the Act's statutory provisions allowing for closing of meetings in accordance with procedures set forth in the Act.

these meetings went beyond the appropriate exceptions.¹⁰ Therefore, we find no violation of the Act.¹¹

V

Conclusion

In summary, we find that the State Board's discussions are not subject to the Open Meetings Act when it administers school reconstitution matters within the context of its existing regulatory program. In administering the program, the State Board is carrying out an executive function. This exclusion from the Act extends to meetings that the State Board held with representatives of the Baltimore City School System concerning a proposal to address schools under local or State reconstitution. It also extends to the State Board's imposition of a one-year moratorium on naming new schools for reconstitution under its existing regulatory program. Therefore, the State Board did not violate the Act.

OPEN MEETING COMPLIANCE BOARD*

Courtney McKeldin
Tyler G. Webb

*Chairman Walter Sondheim, Jr., did not participate in the preparation or approval of this opinion.

¹⁰ In its response, the State Board also relied on §10-508(a) in connection with several meetings involving Westport and the Baltimore City School System's contract with Victory Schools, Inc. See note 9 above.

¹¹ Although we find that the State Board did not violate the Open Meetings Act in connection with the meetings in question, we note the State Board's practice of citing in its minutes and written statement justifying a closed meeting both §10-503(a)(1)(i) and (iii), indicating that the Act does not apply, and select provisions of §10-508(a), statutory exceptions allowing a meeting to be closed. Although there is no reason that the State Board cannot simultaneously consider matters in closed session under §10-508(a) and matters outside the scope of the Act, this practice may result in some puzzlement among members of the public who review a written statement seeking to discern the relationship between the topics discussed at a meeting and the rationale for closing the meeting. We encourage the State Board to review this matter to clarify the manner of documenting its closed sessions.